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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 819

FRANKLINVILLE REALTY COMPANY, *Petitioner*,

vs.

ARNOLD CONSTRUCTION COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

T. J. BLACKWELL,
Counsel for Petitioner.

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Memorandum Concerning Records and Opinions of Lower Courts.

This was a non-jury case. After incomplete first trial, it was appealed and docketed as No. 9801, C. C. A. 5th Circuit (see *Franklinville* v. *Arnold,* 120 F. 2d 144). After remand and completion of the trial, a second appeal was taken and docketed as No. 10455, C. C. A. 5th Circuit. The second appeal was decided on January 20, 1943, but the opinion has not yet been reported.

The records used in the Circuit Court of Appeals have not been reprinted, but have been completed, as permitted by the rule, to make the record here.

So much of the record as was embraced in case No. 9801 (first appeal) will be referred to as "R."

So much of the record as was embraced in case No. 10455 (second appeal) will be referred to as "R. 2d."

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States Supreme Court, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Summary Statement of the Matter Involved.

This suit was originally brought in the Circuit Court of Palm Beach County, Florida, and removed to the United States District Court for the Southern District of Florida on the ground of diversity of citizenship. Arnold Construc-

tion Company, a Florida corporation, as a building contractor, sought foreclosure in equity of a lien on a partially completed dwelling house and swimming pool claimed under the provisions of Section 5396, Compiled General Laws of Florida, as against the Franklinville Realty Company, a Pennsylvania corporation, owner of the property and petitioner here.

A judgment was entered in the District Court granting the contractor such relief (R. 1146). On appeal the judgment was set aside (120 F. 2d 144). It was determined that the District Court had committed reversible error in holding certain architect's certificates final and conclusive, inasmuch as there was no provision in the building contract between the parties giving them that effect.

In that appeal, the United States Circuit Court of Appeals for the Fifth Circuit stated and held that: "The one point upon which *the case must be reversed* is the finding that the architect's certificates are final and conclusive as to the amount due for work done and materials furnished." But the said appellate court proceeded to decide and to adjudge that the foreclosure decree entered below should be and was *affirmed in part and reversed in part*, with a remand of the cause "for further proceedings limited to the presentation of evidence as to whether or not the labor and services listed in the certificates were actually used on the job," etc. The said opinion and decision was otherwise completely silent as to the defense of fraud and collusion relied upon by petitioner.

After the taking of additional testimony in the court below concerning the alleged indebtedness, and the making of a record for review under Rule 43 (c), judgment was again entered in favor of the contractor (R. 2d, 695). From that judgment, a second appeal to the United States Circuit Court of Appeals for the Fifth Circuit was taken. On that

appeal the judgment of the lower court was, on January 20, 1943, affirmed, upon a record disclosing the following.

By a letter dated March 19, 1937, the contractor (plaintiff) offered to construct the house according to plans and specifications prepared by Treanor and Fatio, architects, for a total fee of $3,000 above all reasonable costs involved, on a fair value basis, in the construction work (Plaintiff's Exh. 1; R. 921). On the same day the plaintiff submitted a bid to Treanor and Fatio, architects, for the construction of the building, in the total sum of $49,979 (Defendant's Exh. 7 for Iden., R. 990-991). In a letter dated March 24, 1937, the defendant accepted the plaintiff's offer to construct the building and pool for a total fee of $3,000 above all costs involved in the completion of the job. In its letter accepting the plaintiff's offer the defendant stated that a written contract would be entered into shortly between the parties (Plaintiff's Exh. 2; R. 922). A formal contract between the parties was later prepared and signed (R. 21).

From March 19, 1937, to July 19, 1937, the contractor performed work and furnished materials and labor towards the erection of the house. Petitioner ordered the contractor to cease work on the date last mentioned, in order to give its President an opportunity to examine reports forwarded to him (Plaintiff's Exh. 37; R. 946; R. 73-74). He had then been informed that the house and swimming pool (exclusive of a seawall and groyne), in the hands of Arnold Construction Company, would cost $90,000 (Plaintiff's Exh. 38; R. 947). It had not at any time prior thereto been intimated that such cost would exceed the original estimate or be in excess of the contemplated maximum of $50,000. It later developed that architect's certificates had been improvidently issued for $53,129.50, and that the building was about half finished. At that time petitioner had paid the contractor $30,500, that being enough to cover the work done on a reasonable cost and fair value basis. Peti-

tioner's refusal to pay the grossly excessive amounts demanded resulted in this suit.

The District Court permitted the architects, Treanor and Fatio, a partnership, to intervene in the foreclosure suit as plaintiffs (R. 115). After the first appeal and during the second trial, petitioner undertook to further cross-examine Frederick G. Seelman, a member of that partnership, who had initially been a witness for the contractor. The right to such cross-examination was denied (R. 2d, 554, 560). Petitioner then called both Frederick G. Seelman and Maurice Fatio, also a member of the firm of architects (R. 2d, 547, 636), as adverse parties, for cross-examination, pursuant to Rule 43 (b) of the Rules of Civil Procedure. The contractor's objections to such examinations were sustained and petitioner then made application for leave to cross-examine the named adverse witnesses, pursuant to Rule 43 (c) for the preservation of a record. This also was denied (R. 2d, 638, 639).

After the first appeal, wherein it was held that the architect's certificates were not conclusive, the petitioner amassed a large volume of evidence showing that the architect's certificates had been fraudulently and collusively issued to the contractor. However, the District Court expressly declined to consider such evidence and disregarded it entirely, holding that it was incumbent upon petitioner to disprove, item by item, the charges for labor and material represented by the said architect's certificates, without regard for the reasonable cost and fair value of the work as a whole. After permitting petitioner to offer relevant and competent proof sufficient to prove such fraud and collusion, the District Judge at the conclusion of such second trial ruled (R. 2d, 687) as follows:

> "I realize that defendant contends there was a lack of good faith on the part of Arnold Construction Company in the carrying out of the contract, and that the

> securing of the approval of work done through the issuance of architect's certificates *was a collusive proceeding* between Arnold Construction Company and the architect, but I think all of that has been decided by the Court of Appeals, *is not an open question*, and the District Court should not now go back through the contract and relitigate the alleged lack of good faith, and *retry* this issue. The District Court should consider whether the defendant has upset on this re-reference or rehearing the prima facie effect of the architect's certificates."

The contractor failed completely to produce any original payroll books kept on the job from day to day; completely failed to produce any delivery tickets showing the delivery of the materials charged for; and failed to produce as witnesses persons having knowledge of the facts reflected in its book entries. On the other hand, it was shown that the contractor was engaged in speculative building of homes for sale (R. 2d, 500, 510) while petitioner's job was under way, and that a person who did not purport to have knowledge of the matter directed that large disbursements for labor and material in the sum of $41,221.29 (R. 2d, 578-614) be charged against petitioner. The contractor's book entries, bill, invoices and receipts were otherwise unauthenticated and legal evidence of the alleged indebtedness was not produced, except to the extent that the architect's certificates can be considered as evidence.

Architect's certificates Nos. 6, 7, 8 and 9 were issued after the work was stopped and the contract terminated (R. 81-88). They were dated July 24, September 15, November 8 and November 9, 1937, and were for $4207.14, $2506.59, $1413.70 and $5883.50, respectively. Such certificates, issued after July 19, 1937, aggregated the sum of $14,010.93. Although the architects did not have the status of arbitrators, and were themselves charged with misconduct and

collusion, their certificates, so issued after the development of the controversy, and during the pendency thereof, were given the force and effect of evidence, and made conclusive against petitioner, in the absence of performance by petitioner of a manifest impossibility, i.e., disproving the contractor's claims for labor and materials, item by item.

In deciding the second appeal and in handing down the opinion herein dated January 20, 1943, the United States Circuit Court of Appeals for the Fifth Circuit passed over the questions of law presented under assignments of error founded upon exceptions to the Auditor's Report (R. 2d, 673-681) and neither affirmed nor denied that the record discloses that the District Court misinterpreted and incorrectly applied the appellate court's opinion and decision on the first appeal herein. The said appellate court declared that petitioner "was entitled and was permited to offer all relevant proof" and that the court "cannot say that the findings are so clearly wrong as to require a reversal". It neither affirmed nor denied that the admission of competent and highly important evidence for the express purpose of disregarding it is an illusory, futile and non-beneficial proceeding, not comporting with the essential requirements of due process of law.

II.

Jurisdictional Statement.

(1) The date of the final judgment to be reviewed is January 20, 1943 (R. 2d, 718). That judgment was rendered on a second appeal in this non-jury case. On the first appeal, decided June 3, 1941, the judgment below was "affirmed in part and reversed in part, and cause remanded for further proceedings in accordance with opinion". The two appeals were presented, successively, to the United States

Circuit Court of Appeals for the Fifth Circuit as its cases No. 9801 and No. 10455. The transcripts in the stated cases constitute the complete record here, without duplication.

(2) The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240, United States Judicial Code (U. S. C. A. Title 28, Section 347). That section provides in part as follows:

> "(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

III.

Questions Presented.

The questions presented herein by the petitioner are as follows:

1. Did the District Court afford petitioner due process of law in denying petitioner's motion for leave to recall plaintiff's witnesses for further cross-examination, after the Circuit Court of Appeals had held that the architect's certificates were not final and conclusive and had remanded the case for further proceedings, full cross-examination prior to the appeal having been substantially precluded by the erroneous ruling of the District Court that the said certificates were final?

2. Is it necessary for the party cross-examining to give the trial court information as to the answers expected, in

order to take advantage in a Federal appellate court of the refusal of the trial court to permit proper cross-examination?

3. Was petitioner denied a substantial and essential right by the refusal of the District Court to permit petitioner to interrogate hostile and unwilling witnesses by leading questions, attempted to be put to the witnesses under Rule 43 (b) of the Rules of Civil Procedure?

4. Did the District Court during the rehearing act within the bounds of legitimate discretion, or on the other hand, in violation of an absolute right existing by virtue of Rules 43 (b) and 43 (c) in sustaining objections to petitioner's application for leave to cross-examine Maurice Fatio and Frederick G. Seelman, who were parties to the cause as intervening plaintiffs?

5. Does due process of law require that an equity case be determined on equitable principles or may an equity court, in a foreclosure case, give such weight to impeached and discredited architect's certificates, issued as self-serving declarations, as to establish the same as arbitrary mandates?

6. Where at the first non-jury trial it was capriciously and unreasonably held that architect's certificates were final and conclusive, and the defendant was thereby precluded from showing that said certificates were improperly and collusively issued, could the trial court, after appeal, reversal and remand, under the guise of giving such certificates prima facie effect, expressly disregard all evidence as to collusion between the contractor and the architects, on the ground that such collusion was "not an open question", without doing violence to the due process and equal protection clauses of the Constitution?

7. Where, under a "reasonable cost and fair value" building contract not providing that the architects shall be arbitrators or that their certificates shall be conclusive, a controversy arises resulting in the work being stopped and never completed and the architects and contractor being discharged, can certificates, grossly excessive in amount, issued to the contractor by such architects long after such stoppage and discharge, be given the effect of controlling evidence in a suit wherein the contractor and architects each seek to foreclose liens for services and materials, without manifest violation of the due process and equal protection clauses of the Constitution?

8. Did the Circuit Court of Appeals deny petitioner due process and equal protection of law by adjudicating on the first appeal that the cause should be remanded for "the presentation of evidence as to whether or not the labor and services listed in the certificates were actually used on the job", without requiring or permitting any proof as to the reasonable cost and fair value of the work, and in the absence of such proof of reasonable cost and fair value, by later deciding that the court could not "say that the findings are so clearly wrong as to require a reversal", on the second appeal?

9. Where the record discloses that incompetent evidence by way of ex post facto architect's certificates was received and given conclusive effect; that competent evidence in support of the judgment was not adduced; and that petitioner's evidence, after being nominally admitted, was expressly disregarded by the trier of the facts, was the "hearing" conducted in accordance with due process of law and was the judgment entered against petitioner not arbitrary or capricious, or in conflict with fundamental principles protecting private rights?

10. In a lien foreclosure case involving a cost plus contract containing a clause to the effect that the contractor recognizes that the owner has reposed a trust in him, thereby establishing a fiduciary relationship, can the controversy be resolved without regard for the question as to reasonable cost and fair value, on an arbitrary basis, without violation of the due process clause of the constitutional amendment?

11. Did the Circuit Court of Appeals in fact adjudicate on the first appeal that the contractor was entitled to recover, thereby settling all questions except as to the amount of the judgment subsequently to be entered below? If so, how was it then and there determined that the contractor had in fact earned more than the $30,500 which admittedly had been paid, the architect's certificates having been declared inconclusive and there being no other evidence of the alleged indebtedness? Was not such prejudgment, if actually made, a denial of due process of law?

12. Is the foreclosure of a mechanic's lien on Florida real estate, alleged to exist only by virtue of a statute of Florida, purely a local matter, in which the Federal courts should follow the decisions of the Supreme Court of Florida?

IV.

Reasons Relied On for the Allowance of the Writ.

1. The Circuit Court of Appeals for the Fifth Circuit has rendered in this case, on successive appeals, decisions that are conflicting and that have been so applied as to deprive petitioner of due process of law required by the Fifth Amendment to the Constitution of the United States, as follows: (a) It was decided on the first appeal that the judgment of the District Court must be reversed for holding that the architect's certificates were final and conclusive; (b) that nevertheless the judgment then entered in said

appellate court was not in conformity with the said decision, the judgment being that the foreclosure decree entered below should be and was affirmed in part and reversed in part, whereas absolute reversal for fundamental error was required; and (c) yet there was a further holding on the second appeal herein, by the same Court, that its original decision, on the first appeal, was in fact an affirmance, rather than a reversal.

2. The Circuit Court of Appeals for the Fifth Circuit denied the petitioner due process of law in affirming, on the second appeal, a decree of foreclosure made in the District Court without more than a mere colorable and illusory hearing as to the merits of the controversy, and entered upon the District Court's stated belief that the matter in controversy, i.e., fraud and collusion between the architects and the contractor as to issuance of architect's certificates, was "not an open question", under the prior decision, on the former appeal.

The several decisions and judgments of the United States District Court for the Southern District of Florida and of the United States Circuit Court of Appeals for the Fifth Circuit were so worded, interpreted, construed, arranged and applied at different stages of the proceedings that this petitioner has been denied a right usually accorded other litigants; that is to say, the right to present competent and preponderating evidence as to the merits of the matter in litigation, under such circumstances and under such conditions that the litigant may rightly assume that such competent evidence will not only be admitted, nominally, but that it will be weighed and its probative effect considered and determined. In expressly declining to so weigh and consider the evidence in this cause the District Court denied petitioner due process of law, such as is required by the Fifth Amendment to the Constitution of the United States, and the said Court thereby proceeded in an unreasonable

and capricious manner, so as to deprive petitioner of property on a basis coming close to the boundary of arbitrary action.

3. The Circuit Court of Appeals for the Fifth Circuit abdicated its function to review and correct errors of the lower court, on the second appeal, in declaring that it "cannot say that the findings are so clearly wrong as to require a reversal", when the findings of the lower court neither contained nor purported to contain an adjudication that the amount of the decree for the foreclosure of the mechanic's lien represented the reasonable costs of the work done and materials furnished, on a fair value basis; and neither contained nor purported to contain any finding that the architects and contractor were free from fraud and collusion. And the said appellate court thereby denied petitioner due process of law, in failing to observe and to correct gross and obvious error, such as will or may result in an unconstitutional taking of petitioner's property.

4. In holding that architect's certificates issued after the severance of relations between the parties, and after termination of the contract and during the pendency of a controversy between the owner on one side and the contractor and the architects on the other, made out a prima facie case for the contractor, notwithstanding evidence of fraud and collusion which the court declined to consider, petitioner, as such owner, was denied due process and equal protection of law, to-wit:

(a) The architect's certificates were thereby made fetishes, and granted sacrosanct status, as creating a presumption against petitioner, though the said presumption was based neither on common experience nor common sense.

(b) The stated presumption was, by the court's decisions, permitted to stand as final and conclusive, unless rebutted on a basis not reasonably within human accom-

plishment. They were given the force and effect of juridical determinations of the matter of the alleged indebtedness. The architects were thereby made the judges in their own cause, i.e., a cause in which they intervened as plaintiffs and as petitioner's adversaries.

(c) The fact that said certificates were issued by a clerical employee of the architects, without the determination or attempted determination of any question as to reasonable value and fair market price, was disregarded.

(d) Under the circumstances and conditions of this case, a judicial fiat was unreasonably allowed to take the place of evidence; a mere assertion, by way of purported opinion and conclusion, and represented by so-called certificates issued during the pendency of a controversy, has been allowed to create a presumption that is wholly arbitrary, and petitioner has been denied a fair opportunity to repel such presumption.

5. The Circuit Court of Appeals for the Fifth Circuit has rendered in this case a decision concerning the enforcement of the Uniform Mechanics' Lien Act, Chapter 17097, 1935 Florida Laws (Compiled General Laws of Florida, Permanent Supplement, Volume 4, Section 5396, Sub-sections 1 to 35, inclusive), and has interpreted and applied the said Act in a manner conflicting with the decisions of the Supreme Court of Florida, in the cases of *Langford* v. *Read,* 69 Fla. 198, 68 So. 723, 726; *Alsheimer* v. *Palmer,* 119 Fla. 335, 161 So. 559; and *G. A. Chapman* v. *St. Stephens Protestant Episcopal Church, Inc., and the Trustees of the Diocese of South Florida,* 10 So. (2d) 324 (Advance Sheets), requiring clear and conclusive proof in regard to the establishment and enforcement of mechanics' liens through decree for foreclosure, in equity.

6. Maurice Fatio and Frederick G. Seelman, members of the partnership of Treanor and Fatio, architects, who in-

tervened in this case as plaintiffs, were and are adverse parties, and as such were subject to cross-examination, particularly pursuant to Rule 43 (b) and Rule 43 (c) of the Rules of Civil Procedure, as a matter of right, and not merely in the discretion of the lower court. In holding that the District Court committed no error in precluding petitioner's cross-examination of said witnesses, pursuant to Rule 43 (b) and Rule 43 (c), as aforesaid, the Circuit Court of Appeals for the Fifth Circuit has denied petitioner due process of law, and has thereby rendered in this case a decision on a question of general importance in a manner that appears to be in conflict with the weight of authority. The question in that regard, under the Rules of Civil Procedure, is one of importance that ought to be settled by the United States Supreme Court.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the Seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket No. 9801 and No. 10455, Franklinville Realty Company, Appellant *v.* Arnold Construction Company, Appellee, to the end that the said cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgments herein of said Circuit Court of Appeals be reversed by the Court, and for such further relief as this Court may deem proper.

Dated this 6th day of March, 1943.

T. J. BLACKWELL,
Counsel for Petitioner.

BRIEF.

A. Cross-examination of Adverse Parties and Witnesses Was a Matter of Right.

In an appendix hereto, we have reproduced the record of the colloquy between the court and counsel, with pertinent parts of the interrogations, to demonstrate that petitioner's questions numbered 1 to 4, as set forth in the petition, are substantial in character and are fully supported by the transcript. For the sake of brevity, the questions will not be repeated here, and extensive record citations will be omitted.

As full cross-examination of the plaintiff's witnesses had been substantially precluded by the erroneous ruling of the District Court that the architect's certificates were final, prior to the first appeal, petitioner was prejudiced by the curtailment of the cross-examination of such witnesses at the second hearing, and the opinion of the Circuit Court of Appeals in this connection is in direct conflict with prior decisions of other Circuit Courts of Appeal and of the Supreme Court, and is against the weight of authority.

Furlong v. *United States* (C. C. A. 8th), 10 F. (2d) 492;
Farkas v. *United States* (C. C. A. 6th), 2 F. (2d) 644;
Hale v. *Henkel,* 201 U. S. 43, 26 S. Ct. 370, 50 L. Ed. 652, 662;
Alford v. *United States,* 282 U. S. 687, 51 S. Ct. 218, 75 L. Ed. 624.

In the case last cited, the Supreme Court, speaking through the present Chief Justice, said:

> "Cross-examination of a witness is a matter of right. The Ottawa, 3 Wall. 268, 271, 18 L. ed. 165, 167. Its permissible purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his

reputation for veracity in his own neighborhood (cf. Khan *v.* Zemansky, 59 Cal. App. 324, 327ff., 210 Pac. 529; 3 Wigmore, Ev. 2d ed. section 1368, I (1) (b); that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment (Kirschner *v.* State, 9 Wis. 140; Wilbur *v.* Flood, 16 Mich. 40, 93 Am. Dec. 203; (692) Hollingsworth *v.* State, 53 Ark. 387, 14 S. W. 41; People *v.* White, 251 Ill. 67, 72ff., 95 N. E. 1036; Wallace *v.* State, 41 Fla. 547, 574ff., 26 So. 713); and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased (Tla-Koo-Yel-Lee *v.* United States, 167 U. S. 274, 42 L. ed. 166, 17 S. Ct. 855; King *v.* United States, 50 C. C. A. 647, 112 Fed. 988; Farkas *v.* United States (C. C. A. 6th), 2 F. (2d) 644; see Furlong *v.* United States (C. C. A. 8th), 10 F. (2d) 492, 494).

"Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. Knapp *v.* Wing, 72 Vt. 334, 340, 47 Atl. 1075; Martin *v.* Elden, 32 Ohio St. 282, 289. It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. Tla-Koo-Yel-Lee *v.* United States, 167 U. S. 274, 42 L. ed. 166, 17 S. Ct. 855, supra; King *v.* United States, 50 C. C. A. 647, 112 Fed. 988, supra; People *v.* Moore, 96 App. Div. 56, 89 N. Y. Supp. 83, affirmed without opinion in 181 N. Y. 524, 73 N. E. 1129; cf. People *v.* Becker, 210 N. Y. 274, 104 N. E. 396. *To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial*

*right and withdraw one of the safeguards essential to a fair trial. * * *.*"

The denial of petitioner's application for leave to recall plaintiff's witnesses for further cross-examination, after the remand, was not based on the rule that "a party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination." Rather, the District Judge mistakenly believed that the question as to "collusion" between the intervening architects and the contractor-plaintiff "was not open", and was unwilling to permit cross-examination to disclose such collusion. Due process of law was thereby denied.

Prior to the first appeal, Frederick G. Seelman, (member of the architectural firm of Treanor & Fatio, and an intervening plaintiff), had been a witness for the contractor. Petitioner made application, after the remand, for leave to recall him for further cross-examination, along with plaintiff's other witnesses, (R. 2d, 39) without success, as above indicated.

Accordingly, during a subsequent hearing, petitioner invoked Rule 43 (b) of the Rules of Civil Procedure and attempted to examine the said Seelman (R. 2d, 554, 640), and also Maurice Fatio, another member of the firm of the intervening plaintiffs (R. 2d, 547, 636). The District Judge refused to permit such examination, and also denied petitioner's application for leave to make a record of the testimony of these witnesses pursuant to Rule 43 (c), (R. 2d, 636, 638, 639, 640), as is more fully shown in the appendix hereto.

The Circuit Court of Appeals held that the stated rulings were within the discretion of the lower court. It is submitted, however, that the express provisions of the rules confer absolute rights, within which petitioner's motions

and attempted cross-examination came, and that the stated interpretation and application of the cited rules denied petitioner due process herein.

At one point in the proceedings, (as shown in the appendix), the District Judge ruled that Seelman and Fatio were privileged to refuse to answer petitioner's questions because their answers might expose them to civil liability to petitioner in a pending action. That ruling was contrary to the established rule. See 70 C. J., page 742, Section 896, and Jones on Evidence (2d Edition), Vol. 6, page 4909, Section 2480. It was purely abritrary.

Arbitrary discrimination is not due process. *Wallace, Secy. of Agriculture,* v. *Currin,* 95 F. (2d) 856.

If a party is deprived of any substantial right that is usually accorded others, he is denied due process. *Riglander* v. *Star Co.,* 90 N. Y. S. 772.

The right to an adequate cross-examination, and a fair opportunity to subject an adverse witness to this "great and ordinary test of truth" is guaranteed by the due process clause of the Constitution. In re *Megger's Estate,* 278 N. Y. S. 669.

It is respectfully submitted that the Court should grant certiorari to settle the above stated important questions of practice under the Rules of Civil Procedure.

B. An Arbitrary Final Decision Not Purporting to Be Founded on a Consideration of All the Competent Evidence Is Not Due Process.

Reference is made to the fifth, sixth, eighth, ninth and tenth questions, as stated in the petition herein. It appears unnecessary to elaborate on the stated questions at this point, but we wish to again call the Court's attention to the excerpt from the opinion of the District Judge (R. 2d, 687), as quoted in the "Summary Statement of the Matter

Involved", to the effect that the matter of collusion between the architects and the contractor was not considered an open question.

It has been said that "there is no place in our constitutional system for the exercise of arbitrary power", and it has been many times declared that "a competent and impartial tribunal is required by the due process clause". Before the Fourteenth Amendment to the Constitution was adopted, the Supreme Court had stated that it was a "great fundamental rule in the administration of justice * * * that everyone shall have an opportunity of defending his rights before judgment is pronounced against him". *Smith* v. *McCann,* 24 How. 389, 407; 15 L. Ed. 714.

A trial by a biased judge is not in conformity with "due process of law". *National Labor Relations Board* v. *Ford,* 114 F. (2d) 905; certiorari denied 312 U. S. 689, 61 S. Ct. 621, 85 L. Ed. 1126.

The term "bias" is commonly defined judicially as "a predisposition to decide a cause or an issue in a certain way". It is also said to exist when the developments have been such as "not to leave the mind perfectly open to conviction". Manifestly, bias can be created, within such interpretations of the term, by a misconception or misunderstanding as to the issues presented, and as to the burden of proof. And when such bias exists in the trial of such a case as the one at bar, an arbitrary judgment is necessarily brought about.

It has often been stated that fundamental rights of a defendant shall not be so taken from him arbitrarily, or without the right to be heard according to the usual course of law, in such cases as this.

Frank v. *Mangum,* 237 U. S. 309, 334; 35 S. Ct. 582; 59 L. Ed. 969;

Garland v. *Washington,* 232 U. S. 642; 34 S. Ct. 456; 58 L. Ed. 772;

Rogers v. *Peck,* 199 U. S. 425, 435; 26 S. Ct. 87; 50 L. Ed. 256.

The arbitrary refusal to hear a party by counsel (or to consider his evidence) would be a denial of a hearing, and therefore a denial of due process in a constitutional sense.

Powell v. *Alabama,* 287 U. S. 45, 68-69; 53 S. Ct. 55; 77 L. Ed. 158; 84 A. L. R. 527;
Felts v. *Murphy,* 201 U. S. 123, 129; 26 S. Ct. 366; 50 L. Ed. 689;
Kelley v. *Oregon,* 273 U. S. 589, 591; 47 S. Ct. 504; 71 L. Ed. 790.

A legislative (or judicial) presumption is invalid when it is entirely arbitrary, or creates an invidious discrimination, or operates to deprive a party of a reasonable opportunity to present the pertinent facts in his defense, so as to obtain a decision actually based on such facts.

Bandini Petroleum Co. v. *Superior Court,* 284 U. S. 8, 18; 52 S. Ct. 103; 76 L. Ed. 136;
Mobile, J. & K. C. R. Co. v. *Turnipseed,* 219 U. S. 35, 42; 31 S. Ct. 136; 55 L. Ed. 78;
Western & A. R. Co. v. *Henderson,* 279 U. S. 639, 642; 49 S. Ct. 445; 73 L. Ed. 884.

The word "hearing", in the sense of a judicial or quasi judicial proceeding, means the trial of an issue, including the introduction of evidence, the argument, the consideration by the court, and the final decree or order. *Equitable Life Insurance Co. of Iowa* v. *McNamara* (Iowa), 278 N. W. 910, 913.

The "hearing" contemplated by Section 1 of the Railway Labor Act (45 U. S. C. A. 151) is a judicial proceeding in which evidence is received and *weighed* by the trier of the facts. *Shields* v. *Utah, Idaho Cent. R. Co.,* 305 U. S. 177, 59 S. Ct. 160, 83 L. Ed. 111. There, Chief Justice Hughes, speaking for the Court, said:

"In considering the effect of the Commission's determination, the fundamental question is the intent of Congress. The language of the provision points to definite action. The Commission is to '*determine.*' The Commission must determine '*after hearing.*' The requirement of a 'hearing' has obvious reference 'to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts.' The 'hearing' is 'the hearing of evidence and argument.' Morgan *v.* United States, 298 U. S. 468, 480, 80 L. ed. 1288, 1294, 56 S. Ct. 906. And the manifest purpose in requiring a hearing is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist. Interstate Commerce Commission *v.* Louisville & N. R. Co., 227 U. S. 88, 91, 57 L. ed. 431, 433, 33 S. Ct. 185. * * *"

Where it was sought to restrain the enforcement of an order of the Secretary of Agriculture fixing rates for stockyard services, allegations that the Secretary made the rate order without having heard or read the evidence, without having heard oral arguments, or having read or considered briefs, were improperly stricken, since to constitute a "hearing", to meet the requirements of due process of law, the officer making the decision must consider and appraise the evidence. *Morgan* v. *United States,* 298 U. S. 468, 56 S. Ct. 906, 80 L. Ed. 1288; Id., 304 U. S. 1, 58 S. Ct. 773, 999, 82 L. Ed. 1129. (See also *Consolidated Edison Company* v. *National Labor Relations Board,* 305 U. S. 197, 59 S. Ct. 206, 83 L. Ed. 126.)

In *Crowell* v. *Benson,* 285 U. S. 22, 60, 61, 52 S. Ct. 285, 76 L. Ed. 598, 617, 618, Chief Justice Hughes, speaking for a majority of the Court, said:

"In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions,

> both of fact and law, necessary to the performance of that supreme function. The case of confiscation is illustrative, the ultimate conclusion almost invariably depending upon the decisions of questions of fact. This court has held the owner to be entitled to '*a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts.*' Ohio Valley Water Co. *v.* Ben Avon, 253 U. S. 287, 64 L. ed. 908, P.U.R. 1920E, 814, 40 S. Ct. 527, supra. See also Prendergast *v.* New York Teleph. Co., 262 U. S. 43, 50, 67 L. ed. 853, 858, 43 S. Ct. 466; Tagg Bros. & Moorhead *v.* United States, 280 U. S. 420, 74 L. ed. 524, 50 S. Ct. 220, supra; Phillips *v.* Commissioner of Internal Revenue, 283 U. S. 589, 600, 75 L. ed. 1289, 1299, 51 S. Ct. 608. * * *"

The right under the due process clause to a full hearing includes not only the right to introduce evidence, but also to have judicial findings based upon the evidence. *Baltimore & Ohio R. Co.* v. *United States,* 298 U. S. 349, 56 S. Ct. 797, 80 L. Ed. 1209, 1224. The Court there said:

> "The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based upon it."

In the case of *Georgia R. & Electric Co.* v. *Decatur,* 295 U. S. 165, 55 S. Ct. 701, 79 L. Ed. 1365, it was held that the refusal of a state court to receive or consider evidence of lack of benefits to a street railway company which was required by a municipal ordinance to pay the cost of street paving, on the ground that such evidence was immaterial, amounted to a denial of a hearing on that issue, in violation of the due process clause of the Federal Constitution, where the statute authorizing the ordinance directing the assessment for the cost of such improvements, as construed by the state courts, required, as the basis of their operation,

the existence of benefits. There, speaking for a majority of the Court, Mr. Justice Sutherland said:

> "No question is raised as to the competency of the proof which was offered, and evidently there is none. The ruling was simply that it was immaterial. But the existence of benefits resulting from the improvement was material and was deemed so—else why require it, or why create an affirmative presumption in respect of it? Certainly, competent proof tending to overcome a rebuttable presumption of material fact cannot be immaterial; and the refusal of a court to receive *or consider* any proof whatever on the subject amounts to a denial of a hearing on that issue, in contravention of the due process of law clause of the Constitution. Saunders *v.* Shaw, 244 U. S. 317, 319, 61 L. ed. 1163, 1165, 37 S. Ct. 638; Bandini Petroleum Co. *v.* Superior Ct. 284 U. S. 8, 19, 76 L. ed. 136, 144, 52 S. Ct. 103, 78 A. L. R. 826; Western & A. R. Co. *v.* Henderson, 279 U. S. 639, 642, 73 L. ed. 884, 887, 49 S. Ct. 445; Zeigler *v.* South & North Ala. R. Co., 58 Ala. 594, 599. Compare Norwood *v.* Baker, 172 U. S. 269, 278, 279, 43 L. ed. 443, 447, 19 S. Ct. 187; Road Improv. Dist. *v.* Missouri P. R. Co., 274 U. S. 188, 71 L. ed. 992, 47 S. Ct. 563; Standard Pipe Line Co. *v.* Miller County Highway Bridge Dist., 277 U. S. 160, 72 L. ed. 831, 48 S. Ct. 441, 58 A. L. R. 126."

A close examination of the judgments of the Circuit Court of Appeals in the light of its two opinions written on the successive appeals will show clearly and unquestionably that the architect's certificates were allowed to have and were given conclusive effect, notwithstanding declarations at times made both in that court and below that they were prima facie only.

The architect's certificates had no quality of an adjudication. They depended for finality on their inherent accuracy, if any. To test whether they were accurate or not, they were subject to being met by any competent proof. Evidence

that the certificates were in no sense accurate, and that they were collusively issued, was expressly disregarded, and petitioner was thereby denied a fair hearing.

C. The Architects Should Not Have Been Accorded the Status of Judges in Their Own Cause.

The record speaks of conflicting judicial views as to what was in fact decided on the first appeal, as indicated by petitioner's seventh and eleventh questions herein.

In its last decision, on the second appeal, the Circuit Court of Appeals, in effect, declared that it had been decided that the architect's certificates, whether issued before or after discharge of the architects, were conclusive to the extent of showing that the plaintiff-contractor was entitled to have judgment against petitioner, and were otherwise conclusive on all points except as to whether the materials and labor charged for actually went into the job, and that as to the latter, the burden of proof was on petitioner.

Not only were the architects so made arbitrators by judicial decree (and not by the contract of the parties), but they were made judges in their own cause; in a cause in which they had intervened and in which they were then before the court as plaintiffs.

In this connection, we refer to Cooley's Constitutional Limitations (Seventh Ed.), pp. 592, 593, 594, as follows:

> "There is also a maxim of law regarding judicial action which may have an important bearing upon the constitutional validity of judgments in some cases. No one ought to be a judge in his own cause; and so inflexible and so manifestly just is this rule, that Lord Coke has laid it down that 'even an act of Parliament made against natural equity, as to make a man a judge in his own case, is void in itself; for *jura naturae sunt immutabilia*, and they are *leges legum*.'
>
> "This maxim applies in all cases where judicial functions are to be exercised, and excludes all who are in-

terested, however remotely, from taking part in their exercise. It is not left to the discretion of a judge, or to his sense of decency, to decide whether he shall act or not; all his powers are subject to this absolute limitation; and when his own rights are in question, he has no authority to determine the cause. * * *

"Accordingly, where the Lord Chancellor, who was a shareholder in a company in whose favor the Vice-Chancellor had rendered a decree, affirmed this decree, the House of Lords reversed the decree on this ground, Lord Campbell observing: 'It is of the last importance that the maxim that "no man is to be a judge in his own cause" should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest.' 'We have again and again set aside proceedings in inferior tribunals, because an individual who had an interest in a cause took a part in the decision. And it will have a most salutary effect on these tribunals, when it is known that this high court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care, not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of laboring under such an influence.'

* * * * * * *

"'* * * To empower one party to a controversy to decide it for himself is not within the legislative authority, because it is not the establishment of any rule of action or decision, but is a placing of the other party, so far as that controversy is concerned, out of the protection of the law, and submitting him to the control of one whose interest it will be to decide arbitrarily and unjustly."

The architects should not have been allowed to serve as judges or as arbitrators to the extent of permitting their

certificates to over-ride the rule alluded to in *Primeau* v. *Granfield,* (2 Cir.), 193 F. 911, 913, as follows:

> "When fraud or illegality is disclosed in a case, public policy requires a court to refuse its aid *irrespective of the state of the pleadings* and regardless of the fact that with fraud and illegality absent the plaintiff might appear entitled to relief. McMullen *v.* Hoffman, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117; Memphis Keely Inst. *v.* Leslie E. Keeley Co., 155 Fed. 964, 84 C. C. A. 112, 16 L. R. A. (N. S.) 921; Teoli *v.* Nardolillo, 23 R. I. 87, 49 Atl. 489; Drake *v.* Lauer, 93 App. Div. 86, 86 N. Y. Supp. 986."

Regardless of the weight given the architect's certificates in this case, the District Court denied petitioner due process of law in holding that the question of collusion "was not open".

D. The Decisions of the Courts Below Are in Conflict With the Decisions of the Highest Court of Florida.

Reference is made to petitioner's twelfth question, and to the authorities cited in section 5 of the "Reasons Relied on for the Allowance of the Writ". For the sake of brevity, the citations of the Florida cases will not be here repeated.

It has always been held by the Supreme Court of Florida that the foreclosure of a mechanic's lien, under the Florida statute, is purely and simply an equitable proceeding; that the plaintiff in such a suit must come into the equity court with clean hands; that he must prove his claim by clear and convincing evidence, and that insofar as "cost plus" contracts are concerned, he does not make out a case by unsupported book entries and unauthenticated invoices and material bills.

The decisions of the District Court and of the United States Circuit Court of Appeals for the Fifth Circuit in the case at bar are in conflict with the stated Florida rules.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, wherein the judgment of the United States District Court for the Southern District of Florida was affirmed.

Respectfully submitted,

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